

## The Quality of Life: From Roe to Quinlan and Beyond

Joseph Cincotta

Follow this and additional works at: <https://scholarship.law.stjohns.edu/tcl>



Part of the [Constitutional Law Commons](#), [Family Law Commons](#), and the [Fourth Amendment Commons](#)

---

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# THE QUALITY OF LIFE: FROM ROE TO QUINLAN AND BEYOND

JOSEPH CINCOTTA\*

## INTRODUCTION

There exists in the United States "a right of privacy older than the bill of rights—older than our political parties, older than our school system."<sup>1</sup> By 1886, the United States Supreme Court interpreted the language of the fourth and fifth amendments as creating a constitutionally protected zone of privacy.<sup>2</sup> For almost eight decades the Court restricted constitutional protection of the right of privacy to the zones explicitly mentioned in the Bill of Rights.<sup>3</sup> In 1965, however, this approach was abandoned in the case of *Griswold v. Connecticut*,<sup>4</sup> wherein the Court looked beyond the explicit language of the Constitution to invalidate a Connecticut statute banning the use of contraceptives.<sup>5</sup> In *Griswold*, Justice Douglas reasoned that although a general right of privacy is not expressly conferred by the Constitution, it is nonetheless protected thereunder, since "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy."<sup>6</sup>

The general right of privacy recognized in *Griswold* has recently been found sufficiently broad to permit a woman to terminate her pregnancy<sup>7</sup> and under certain circumstances, to permit a patient to decline medical treatment.<sup>8</sup> It is submitted, however, that these decisions represent much more than the mere expansion of the right of privacy; they deal with fundamental issues concerning the nature of life and death<sup>9</sup> and therefore embody policy determinations that affect the legal, scientific, philosophi-

---

\* B.S., Boston College; J.D., Villanova University School of Law.

<sup>1</sup> *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

<sup>2</sup> *Boyd v. United States*, 116 U.S. 616 (1886); see notes 15-20 and accompanying text *infra*. See generally Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

<sup>3</sup> See notes 15-38 and accompanying text *infra*.

<sup>4</sup> 381 U.S. 479 (1965).

<sup>5</sup> *Id.* at 484-86.

<sup>6</sup> *Id.* at 484 (citation omitted). For a discussion of *Griswold*, see notes 35-38 and accompanying text *infra*.

<sup>7</sup> *Roe v. Wade*, 410 U.S. 133, 153 (1973).

<sup>8</sup> *In re Quinlan*, 70 N.J. 10, 40, 355 A.2d 647, 663, cert. denied, 429 U.S. 922 (1976).

<sup>9</sup> See generally *Roe v. Wade*, 410 U.S. 113 (1973); *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, cert. denied, 429 U.S. 922 (1976).

cal, and religious foundations of American society.<sup>10</sup> More importantly, perhaps, these decisions contain language that apparently is broad enough to permit continued judicial activism, which may result in further alteration of the family structure<sup>11</sup> and diminution of our society's esteem of human life.<sup>12</sup>

This article will trace the development of the right of privacy; analyze its current constitutional interpretation as reflected in *Roe v. Wade*<sup>13</sup> and *In re Quinlan*<sup>14</sup>; and conclude with a discussion of the jurisprudential and societal implications of these decisions.

### DEVELOPMENT OF THE RIGHT OF PRIVACY

In *Boyd v. United States*,<sup>15</sup> one of the earliest decisions recognizing a constitutional right of privacy, the Supreme Court was confronted with the issue whether a state, consistent with the Constitution, could compel a person to produce inculpatory books and papers at trial.<sup>16</sup> Concluding that a state lacks this power,<sup>17</sup> the Court stated that the protections of the fourth and fifth amendments "apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life."<sup>18</sup> Justice Brandeis revealed a similar reverence for the

---

<sup>10</sup> See generally Tribe, *The Supreme Court 1972 Term Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973); Williams, *Euthanasia and Abortion*, 38 U. COLO. L. REV. 178 (1966).

<sup>11</sup> See generally notes 72-74 and accompanying text *infra*.

<sup>12</sup> See notes 96-101 and accompanying text *infra*.

<sup>13</sup> 410 U.S. 113 (1973). For a discussion of *Roe*, see notes 39-45 and accompanying text *infra*.

<sup>14</sup> 70 N.J. 10, 355 A.2d 647, *cert. denied*, 429 U.S. 922 (1976). For a discussion of *Quinlan*, see notes 47-49 and accompanying text *infra*.

<sup>15</sup> 116 U.S. 616 (1886).

<sup>16</sup> *Id.* at 633-35. The claimants in *Boyd* were charged with fraudulently importing goods into the United States in order to avoid the payment of duties. *Id.* at 617-18. In support of the prosecution's case, the district attorney offered into evidence an invoice covering the goods in question. *Id.* at 618. The claimants challenged the introduction of this evidence and the constitutionality of the statute authorizing the court, in its discretion, to demand production of the invoice. *Id.* The Court noted that the statute virtually compelled the production of the invoice, since it provided that the district attorney's allegations would be taken as true upon the claimants' failure to produce the invoice. *Id.* at 620-22.

<sup>17</sup> *Id.* at 634-35. In finding that a state may not compel a person to produce inculpatory evidence, the Court stated:

[A] compulsory production of the private books and papers of the owner of goods sought to be forfeited . . . is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution; and is the equivalent of a search and seizure, and an unreasonable search and seizure, within the meaning of the Fourth Amendment.

*Id.*

<sup>18</sup> *Id.* at 630. In another early case, *Union Pac. Ry. v. Botsford*, 141 U.S. 250 (1891), the Supreme Court held that a trial court may not compel the plaintiff in a personal injury action to submit to a surgical examination. *Id.* at 257. Considering the issue to be a matter of the scope of discovery rights in a civil suit rather than a constitutional question, the Court declared: "No right is held more sacred, or is more carefully guarded by the common law,

right of privacy in his oft-quoted dissenting opinion in *Olmstead v. United States*:<sup>19</sup> "The makers of our Constitution . . . conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."<sup>20</sup>

Although the right of privacy recognized by the Court in *Boyd* and by Justice Brandeis in *Olmstead* was derived from the specific guarantees of the fourth and fifth amendments,<sup>21</sup> it has, by no means, been restricted to protect solely against unreasonable searches and seizures or self-incrimination.<sup>22</sup> In *NAACP v. Alabama*,<sup>23</sup> for example, the Court found that a right of privacy implicitly is guaranteed by the first amendment.<sup>24</sup> Applying this principle to the facts of the case, the Court held that the NAACP could not be forced to reveal the names of its Alabama members and agents as a prerequisite for doing business in the state, observing that "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association . . . ."<sup>25</sup> The Court further noted that privacy of association is "an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment which embraces freedom of speech."<sup>26</sup>

---

than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Id.* at 251.

<sup>19</sup> 277 U.S. 438 (1928). In *Olmstead*, defendants were convicted of conspiring to violate the National Prohibition Act by handling and selling intoxicating liquors. *Id.* at 455. The information leading to their convictions was obtained by federal prohibition officers through the use of telephone wiretaps inserted without trespassing on the defendants' property. *Id.* at 456-57. The Supreme Court affirmed the convictions, holding that the wire tapping was not a search and seizure within the meaning of the fourth amendment. *Id.* at 466.

<sup>20</sup> *Id.* at 478 (Brandeis, J., dissenting). Justice Brandeis was one of the earliest proponents of the right of privacy. In 1890, he co-authored an article that was to become the first major article expounding on the right of privacy as a basis for tort recovery. See Warren & Brandeis, *supra* note 2, at 213.

<sup>21</sup> *Olmstead v. United States*, 277 U.S. 438, 457-69 (1928); *Boyd v. United States*, 116 U.S. 616, 630 (1886). For further discussion of the right of privacy in the context of the fourth and fifth amendments, see *Katz v. United States*, 389 U.S. 347 (1967).

<sup>22</sup> See notes 24 & 28-32 and accompanying text *infra*.

<sup>23</sup> 357 U.S. 449 (1958).

<sup>24</sup> *Id.* at 462. NAACP arose after a judgment of civil contempt was entered against the NAACP for failing to comply with a court order requiring the production of membership lists. *Id.* at 451. The membership list had been ordered in an attempt to ascertain the nature and extent of the organization's intrastate business within the meaning of Alabama's foreign corporation qualification statute. *Id.* at 453.

<sup>25</sup> *Id.* at 462. In a similar case, *Stanley v. Georgia*, 394 U.S. 557 (1969), the Supreme Court overturned a conviction for possession of obscene matter in the privacy of the defendant's home. *Id.* at 565. In so ruling, the Court reiterated the well-established principle that the Constitution protects the right to receive information and ideas, adding that the right to be free from unwarranted governmental intrusions, except in very limited circumstances, is fundamental. *Id.* at 564. Discussing both free speech and privacy rights, the Court concluded that "[w]hatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home." *Id.* at 565 (emphasis added).

<sup>26</sup> *Id.* at 460 (citations omitted).

The fourteenth amendment guarantee of "liberty"<sup>27</sup> to which the Supreme Court alluded in *NAACP* has also been interpreted to include the right to teach and acquire foreign language skills.<sup>28</sup> In the context of family life, this fundamental liberty has been construed to protect the freedom to marry<sup>29</sup> and to direct the upbringing of one's children.<sup>30</sup> This liberty interest also extends into the area of marriage, guaranteeing husband and wife privacy in matters such as procreation<sup>31</sup> and contraception.<sup>32</sup> Indeed, fourteenth amendment cases in general, and *Griswold* in particular, have proved a prolific source of privacy rights.<sup>33</sup> In fact, *Griswold* laid part of the constitutional foundation upon which the *Roe* and *Quinlan* decisions were built.<sup>34</sup>

In *Griswold*, a Connecticut statute making it a crime for anyone to use or assist another in the use of contraceptive devices was challenged as violating the fourteenth amendment.<sup>35</sup> Justice Douglas, writing for the Court, enumerated the specific constitutional guarantees found in the Bill

---

<sup>27</sup> See U.S. CONST. amend. XIV. The fourteenth amendment provides, in pertinent part: No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

*Id.*

<sup>28</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923); see note 30 *infra*.

<sup>29</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967). In *Loving*, a black woman and a white man were found guilty of violating a Virginia statute prohibiting whites from being parties to interracial marriages. *Id.* at 3-4. The Supreme Court reversed, stating: "Under our Constitution, the freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State." *Id.* at 12. The Court added that "[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival." *Id.* (quoting *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

<sup>30</sup> *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923). In *Meyer*, an individual challenged a conviction for unlawfully teaching German to a 10-year-old child. *Id.* at 396-97. In overturning the conviction, the Court stated that appellant's "right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [fourteenth] Amendment." *Id.* at 400 (emphasis added).

<sup>31</sup> *Skinner v. Oklahoma*, 316 U.S. 535 (1942). *Skinner* arose following a trial court's order that the defendant be sterilized pursuant to an Oklahoma statute providing such punishment for "habitual criminals." *Id.* at 536-37. In declaring the Act unconstitutional, Justice Douglas, writing for the majority, stated: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." Justice Douglas concluded that if the defendant were sterilized, he would be "forever deprived of a basic liberty." *Id.* at 541.

<sup>32</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 486-507 (1965). See also *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972).

<sup>33</sup> See notes 35-45 and accompanying text *infra*.

<sup>34</sup> See *Roe v. Wade*, 410 U.S. 133, 152-53 (1973); *In re Quinlan*, 70 N.J. 10, 39-40, 355 A.2d 647, 663, cert. denied, 429 U.S. 922 (1976).

<sup>35</sup> 381 U.S. at 480-81. The appellants in *Griswold* were arrested under Connecticut's aiding and abetting statute for giving information, instruction and medical advice to married persons as to the means of preventing conception. *Id.*

of Rights, which, together with their "penumbras,"<sup>36</sup> created zones of privacy.<sup>37</sup> Douglas concluded that the state's statutory scheme violated the fourteenth amendment because it swept "unnecessarily broadly" and had a destructive impact upon the marriage relationship—a relationship lying within the zone of privacy created by several constitutional guarantees.<sup>38</sup>

---

<sup>36</sup> *Id.* at 482-85. Justice Douglas articulated this "penumbral" theory as follows:

The association of people is not mentioned in the Constitution nor in the Bill of Rights. The right to educate a child in a school of the parents' choice—whether public or private or parochial—is also not mentioned. Nor is the right to study any particular subject or any foreign language. Yet the First Amendment has been construed to include certain of those rights.

*Id.* at 482. Justice Douglas further noted:

The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read and freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community. Without those *peripheral* rights the specific rights would be less secure.

*Id.* at 482-83 (citations omitted)(emphasis added). Given the existence of these peripheral rights, Justice Douglas concluded that "The First Amendment has a *penumbra* where privacy is protected from governmental intrusion." *Id.* at 483 (emphasis added).

<sup>37</sup> See *id.* at 484; text accompanying note 6 *supra*. Justice Douglas specifically pointed to the first, third, fourth, fifth and ninth amendments as protecting certain aspects of the right of privacy. 381 U.S. at 484. These enumerated provisions were held to have emanations or penumbras that give the provisions substance and collectively form protected zones of privacy. *Id.* at 484-85.

<sup>38</sup> 381 U.S. at 485-86. In a concurring opinion, Justice Goldberg, joined by Chief Justice Warren and Justice Brennan, echoed Justice Douglas's condemnation of the Connecticut statute as overbroad. *Id.* at 498 (Goldberg, J., concurring). Yet, rather than relying on the "penumbral" theory, he took the view that "the right of privacy in the marital relation is fundamental and basic—a personal right 'retained by the people' within the meaning of the Ninth Amendment. Connecticut cannot constitutionally abridge this fundamental right, which is protected by the Fourteenth Amendment from infringement by the States." *Id.* at 499 (Goldberg, J., concurring). Justice Harlan, who filed a separate concurring opinion, viewed the Connecticut statute as an infringement of the due process of the fourteenth amendment because it violated basic values "implicit in the concept of ordered liberty." *Id.* at 500 (Harlan, J., concurring)(citation omitted). Similarly, in the final concurring opinion, Justice White stated that "this Connecticut law as applied to married couples deprives them of 'liberty' without due process of law, as that concept is used in the Fourteenth Amendment." *Id.* at 502 (White, J., concurring).

Dissenting, Justice Black criticized the majority and concurring opinions, even though he too found the statute "offensive." *Id.* at 507 (Black, J., dissenting). Advocating a stricter interpretation of the Constitution, he concluded: "I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision." *Id.* at 510 (Black, J., dissenting). Justice Stewart also wrote a dissenting opinion, in which he, too, criticized Douglas's expansive interpretation of the Constitution:

In the course of its opinion the Court refers to no less than six Amendments to the Constitution: the First, the Third, the Fourth, the Fifth, the Ninth, and the Fourteenth. But the Court does not say which of these Amendments, if any, it thinks is infringed by this Connecticut law.

*Id.* at 527-28 (Stewart, J., dissenting). Stewart concluded that "[w]ith all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court." *Id.* at 530 (footnote omitted).

It was against this background that the plaintiff in *Roe v. Wade*<sup>39</sup> claimed that the Texas criminal abortion statute<sup>40</sup> abridged her constitutionally protected right of personal privacy and that it was unconstitutionally vague.<sup>41</sup> Sustaining this claim, the Supreme Court held that the statute was overly broad since it drew no distinction between abortions performed early in pregnancy and those performed later.<sup>42</sup> Justice Blackmun, writing for the majority, relied on the right of privacy for support:

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty, and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of right to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.<sup>43</sup>

Interestingly, the Court acknowledged that this right of privacy is not absolute<sup>44</sup>—the individual's right of privacy may be subordinated to a compelling state interest.<sup>45</sup>

---

The fears of expansion of this general right of privacy, voiced by Justices Black and Stewart, were borne out somewhat in 1972 in *Eisenstadt v. Baird*, 405 U.S. 438 (1972). The *Eisenstadt* ruling expanded the right of privacy recognized in *Griswold* by prohibiting a ban on the distribution of contraceptives to unmarried persons. *Id.* at 453-54. In the course of its opinion, the Court stated that "[i]f the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Id.* at 453 (emphasis supplied by the Court)(footnote omitted)(citing *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).

<sup>39</sup> 410 U.S. 113 (1973). The appellant in *Roe*, an unmarried, pregnant woman, "wished to terminate her pregnancy by an abortion 'performed by a competent, licensed physician, under safe, clinical conditions.'" *Id.* at 120. She alleged that, because of a statutory ban, she was unable to obtain such a "legal" abortion since her life was not threatened by the continuation of her pregnancy. *Id.*

<sup>40</sup> The Texas statutes imposed criminal penalties on anyone who obtained or performed an abortion, unless for the purposes of saving the mother's life. *Id.* at 117-18 n.1.

<sup>41</sup> *Id.* at 120. Specifically, the appellant claimed that the Texas statute abridged her right of privacy protected by the first, fourth, fifth, ninth, and fourteenth amendments. *Id.*

<sup>42</sup> *Id.* at 164.

<sup>43</sup> *Id.* at 153.

<sup>44</sup> *Id.* at 153-54. Specifically, the majority stated:

The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. . . . [A] State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute.

*Id.*

<sup>45</sup> *Id.* at 155. Having determined that a woman's right to terminate her pregnancy was a part of the fundamental right of privacy, the Court measured the constitutionality of the Texas abortion statute according to the "compelling state interest" test. *Id.* at 152, 155. In applying this test, the Court noted that a state's interest in the health of the mother becomes compelling only at the end of the first trimester because maternal mortality from abortions prior to that point may be less than in normal childbirth. *Id.* at 163. Until the end of the first

While the notion of privacy espoused in *Roe* has been applied in other abortion-related cases,<sup>46</sup> the Supreme Court has not yet had occasion to

---

trimester, therefore, a woman is free from state interference with a contemplated abortion. *Id.* After the first trimester, the state may regulate abortion procedures to the extent that those procedures are reasonably related to the preservation and protection of the mother's health. *Id.* In discussing the potential life of the fetus, the *Roe* majority determined that a compelling state interest arises at viability—the point at which the fetus presumably has the capability of meaningful life outside the mother's womb. *Id.* at 160, 163. At that point, according to Justice Blackmun, "[s]tate regulation protective of fetal life . . . has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother." *Id.* at 163-64. The point of viability generally is placed at about seven months but may occur as early as the sixth month. *Id.* at 160. In a companion case to *Roe*, the Supreme Court invalidated a Georgia statute that proscribed all abortions except those performed by a licensed physician when, in his

best clinical judgment . . . an abortion is necessary because:

(1) A continuation of the pregnancy would endanger the life of the pregnant woman or would seriously and permanently injure her health or

(2) The fetus would very likely be born with a [serious] . . . mental or physical defect; or

(3) The pregnancy resulted from . . . rape.

*Doe v. Bolton*, 410 U.S. 179, 192 (1973) (footnote omitted).

<sup>46</sup> See, e.g., *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). In *Danforth*, the Supreme Court extended the woman's freedom to terminate a pregnancy by invalidating, *inter alia*, two provisions of the Missouri abortion act that prohibited the performance of an abortion unless prior consent were obtained from either the woman's husband or, in the case of an unmarried minor, a parent or person *in loco parentis*. *Id.* at 67-75. In setting aside the consent requirement for abortions performed during the first trimester, the *Danforth* Court stated: "Clearly, since the State cannot regulate or proscribe abortion during the first stage, when the physician and his patient make that decision, the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period." *Id.* at 69. Although the Court acknowledged its concern for the plight of the husband and recognized the profound effects that the abortion decision may have on a marriage, it nonetheless ruled that since it is the woman who physically bears the child and is affected more directly by the pregnancy, the decision whether to abort must ultimately rest with her and her physician. *Id.* at 69-71. In reaching its decision, the Court considered the state's interest in safeguarding the family unit and parental authority. *Id.* at 75. While recognizing that the state has somewhat broader authority to regulate children's activities than those of adults, the Court concluded that no independent interest of either the state or the parents was "more weighty than the right of privacy of the competent minor mature enough to have become pregnant." *Id.* at 74-75 (emphasis added).

Intimately involved with the exercise of the "constitutional" right to terminate a pregnancy is the question of state-funded abortions. See, e.g., *Beal v. Doe*, 432 U.S. 438 (1977); *Maier v. Roe*, 432 U.S. 464 (1977). *Beal* and *Maier* involved challenges to state medicaid programs that restricted financial assistance for first trimester abortions to those abortions which were medically necessary. 432 U.S. at 441, 466. In upholding the constitutionality of these regulations, the Supreme Court noted that while a state is free to extend Medicaid coverage to the costs of nontherapeutic abortions, it is not constitutionally compelled to do so. *Id.* at 447, 480. The Court found support for these regulations in the state's "legitimate interest in protecting the potentiality of human life" and in its "strong and legitimate interest in encouraging normal childbirth." *Id.* at 445-46, 478. See also *Poelker v. Doe*, 432 U.S. 519, 521 (1977) (per curiam) (city may provide publicly financed hospital services for childbirth without providing corresponding services for nontherapeutic abortions).



comment on the applicability of the general right of privacy to other questions involving fundamental issues of human life. The New Jersey Supreme Court, however, addressed one of these issues in the 1976 case of *In re Quinlan*.<sup>47</sup> The issue confronting the *Quinlan* court was whether it had the power to authorize the withdrawal of life-sustaining mechanisms from a terminally ill patient.<sup>48</sup> In holding that it was so empowered, the court stated the right of privacy is "broad enough to encompass a patient's decision to decline medical treatment under certain circumstances, in much the same way as it is broad enough to encompass a woman's decision to terminate pregnancy under certain conditions."<sup>49</sup>

### CONSTITUTIONAL PROBLEMS

#### *Separation of Powers—Judicial or Legislative Decision*

It is submitted that the courts in *Roe* and *Quinlan* made essentially legislative decisions, involving policy determinations beyond the scope of judicial power.<sup>50</sup> Since the debates surrounding abortion and euthanasia are deeply embroiled in religious controversy among religious groups, it would appear that the courts have exceeded their jurisdiction by hearing cases involving these issues.<sup>51</sup> Indeed, it seems unlikely that the framers

<sup>47</sup> 70 N.J. 10, 355 A.2d 647, cert. denied, 429 U.S. 922 (1976).

<sup>48</sup> 70 N.J. at 22, 355 A.2d at 653. The terminally ill patient, Karen Quinlan, was, in the words of the New Jersey Supreme Court, "a biologically vegetative remnant of life," "requiring 24-hour nursing care, antibiotics, and the assistance of a respirator, a catheter and feeding tube." *Id.* at 38, 41, 355 A.2d at 662, 664. Her father brought the action on her behalf, requesting the court to grant him the authority to terminate the specialized technological life-sustaining mechanisms that were capable only of prolonging Karen's vegetative existence. *Id.* at 22, 355 A.2d at 653.

<sup>49</sup> *Id.* at 40, 355 A.2d at 663 (citing *Roe v. Wade*, 410 U.S. 113, 153 (1973)). The New Jersey court stated: "Although the Constitution does not explicitly mention a right of privacy, Supreme Court decisions have recognized that a right of personal privacy exists and that certain areas of privacy are guaranteed under the Constitution." *Id.* at 39-40, 355 A.2d at 663 (citing *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972); *Stanley v. Georgia*, 394 U.S. 557, 566, 568 (1969)). It was the "penumbral" right of privacy enunciated in *Griswold* and utilized in *Roe* that the court found broad enough to permit the decision to decline medical treatment. See 70 N.J. at 40, 355 A.2d at 663.

<sup>50</sup> There is substantial authority for the proposition that the rights recognized in *Roe* and *Quinlan* were matters of legislative, rather than judicial, concern. See, e.g., *Roe v. Wade*, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting); Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 923-26 (1973); Hyland & Baime, *In Re Quinlan: A Synthesis of Law and Medical Technology*, 8 RUT.-CAM. L.J. 37, 58 (1976). But see Tribe, *supra* note 10, at 30-32. Professor Tribe argues that the usual judicial deference toward legislative determinations, which prohibits second-guessing, is inapplicable in the area of abortion because the intense religious controversy over abortion would inhibit a balancing of competing objectives necessary for a proper legislative resolution of the issue. Moreover, Tribe maintains, the legislature is not a disinterested body since it is being asked permanently to relinquish its role in an area that has, in the past, been part of its jurisdiction. *Id.* at 31.

<sup>51</sup> See Hyland & Baime, *supra* note 50, at 58-60. Messrs. Hyland and Baime, Attorney General and Assistant Attorney General of New Jersey, respectively, contend that only the legis-

of our Constitution could have painted a more appropriate setting for the democratic process, which is preserved for the legislature.<sup>52</sup> Thus, as some critics have observed, *Griswold*, *Roe*, and *Quinlan* apparently signaled a return to *Lochner v. New York*<sup>53</sup> and substantive due process<sup>54</sup> in the area of personal liberties.<sup>55</sup>

---

lature is qualified to reflect the broad public consensus necessary for reformulation of the basic societal judgments involved in *Quinlan*. *Id.* at 58. They note that the legislature, through hearings, stirs public discussion which, in turn, provides the information necessary to make such studied decisions. *Id.* The authors conclude that the *Quinlan* decision "represents a major departure from a normative aspect of society's moral self-conception without legislative consultation." *Id.* at 59. *But see* Tribe, *supra* note 10, at 31 (judicial deference based on assumption that legislation reflects balanced weighing of permissible objectives reaches breaking point when legislation "has been shaped in the cauldron of heated religious controversy").

<sup>52</sup> See *Lochner v. New York*, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting); A. BICKEL, *THE MORALITY OF CONSENT* 25-26 (1975).

<sup>53</sup> 198 U.S. 45 (1905).

<sup>54</sup> The phrase "substantive due process" has been used to describe the period of judicial activism extending from 1905 into the 1930's. G. GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* 550-83 (9th ed. 1975). The discredited accomplishments of the era were aptly summarized by Justice Black in his majority opinion in *Ferguson v. Skrupa*, 372 U.S. 726 (1963):

There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy. In this manner the Due Process Clause was used, for example, to nullify laws prescribing maximum hours for work in bakeries, *Lochner v. New York*, 198 U.S. 45 (1905), outlawing 'yellow dog' contracts, *Coppage v. Kansas*, 236 U.S. 1 (1915), setting minimum wages for women, *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), and fixing the weight of loaves of bread, *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924).

*Id.* at 729.

<sup>55</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting); *Griswold v. Connecticut*, 381 U.S. 479, 507-27 (1965) (Black, J., dissenting); Ely, *supra* note 50, at 937-43. In his dissent in *Roe*, Justice Rehnquist stated: "As in *Lochner* . . . the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be 'compelling.'" 410 U.S. at 174 (Rehnquist, J., dissenting).

Another critic of the *Roe* decision, Professor Ely, has observed that the Court has not drawn so controversial an inference from the Constitution in 35 years. Ely, *supra* note 50, at 937. However, "as the received learning has it, this sort of thing did happen before, repeatedly. From its 1905 decision in *Lochner v. New York* into the 1930's the Court . . . employed the Due Process Clauses of the Fourteenth and Fifth Amendments to invalidate a good deal of legislation." *Id.*; Cf. Cox, *The New Dimensions of Constitutional Adjudication*, 51 WASH. L. REV. 791, 792-802 (1976) (avoidance of legislative and executive oppression and need for consistency of institutional theory led to development of doctrine of "preferred position" for civil liberties, justifying judicial activism and stricter standards of judicial review). *But see* Tribe, *supra* note 10, at 31-32. It is Professor Tribe's belief that the decisions of the *Lochner* era reflected the Court's extraordinary willingness to substitute its judgment for those of legislatures on purely empirical questions. *Id.* at 31. In contrast, he views *Roe* as involving the traditional judicial function of confining a legislature's claim as to the reach of its own role. *Id.* at 32.

Support for the assertion that the *Roe* and *Quinlan* courts exceeded their respective jurisdictions can be drawn from the Supreme Court's rationale in *Maier v. Roe*.<sup>56</sup> In upholding a Connecticut statute limiting expenditures of state medicaid benefits for abortions to those abortions that were medically necessary during the first trimester, the Court stated:

The decision whether to expand state funds for nontherapeutic abortion is fraught with judgments of policy and value over which opinions are sharply divided. Indeed, when an issue involves policy choices as sensitive as those implicated by public funding of nontherapeutic abortions, the appropriate forum for their resolution in a democracy is the legislature.<sup>57</sup>

It is unfortunate that the Supreme Court failed to exhibit such deference to the legislature when it decided whether to grant a woman the right to terminate a pregnancy, because this decision involves policy choices even more "sensitive" than "those implicated by public funding of nontherapeutic abortions."<sup>58</sup>

### *The New Broader Right of Privacy*

Assuming, *arguendo*, that the issues presented in *Griswold*, *Roe*, and *Quinlan* were appropriate for judicial determination, serious jurisprudential problems nevertheless remain. In *Griswold*, Justice Douglas considered a broad right of privacy necessary to halt a "maximum destructive impact upon [the marriage] relationship,"<sup>59</sup> a relationship that the Court previously had found to warrant special constitutional protection.<sup>60</sup> Rather than limiting his conclusions to the scope of these earlier decisions, however, Justice Douglas developed a novel constitutional theory of a "penumbral" right<sup>61</sup> that appears to have reached beyond the boundaries of the case.<sup>62</sup> In a dissenting opinion, Justice Black cautioned against such

---

<sup>56</sup> 432 U.S. 464 (1977). For a discussion of *Maier*, see note 46 *supra*.

<sup>57</sup> 432 U.S. at 479.

<sup>58</sup> The policies bearing on the abortion issue are particularly sensitive since there is by no means unanimous agreement over whether the nonviable fetus is not a human being. See, e.g., *Roe v. Wade*, 410 U.S. 133, 156-62 (1973); C. KOOP, *THE RIGHT TO LIVE; THE RIGHT TO DIE* 43-46 (1979); Tribe, *supra* note 10, at 20-22. Dr. Koop, Chief Surgeon at Children's Hospital, Philadelphia, contends that much of the abortion debate has become a sort of semantic game. C. KOOP, *supra*. "The result has been a curious avoidance of the scientific fact, which everyone actually knows, that human life begins at conception and is continuous . . . until death." *Id.* at 46. It is submitted that the lack of agreement on this vital issue further counsels against judicial intervention in this matter. See Cox, *The Supreme Court and Abortions*, *HUMAN LIFE REV.* 15, 18 (Fall 1976). But see Williams, *supra* note 10, at 197-201.

<sup>59</sup> 381 U.S. at 485.

<sup>60</sup> See *Poe v. Ullman*, 367 U.S. 497, 539-45 (1961) (Harlan, J., dissenting); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>61</sup> See 381 U.S. at 480-86; notes 35-38 and accompanying text *supra*. See also Clark, *Constitutional Sources of the Penumbral Right to Privacy*, 19 *VILL. L. REV.* 833 (1974).

<sup>62</sup> See generally 381 U.S. at 507-27 (Black, J., dissenting); Clark, *supra* note 61, at 833, 841.

an expansive interpretation of the right of privacy: "Privacy is a broad, abstract and ambiguous concept which can easily be shrunk in meaning but which can also, on the other hand, easily be interpreted as a constitutional ban against many things . . . ." <sup>63</sup> It is suggested that this warning has proved to be prophetic, for *Roe* and *Quinlan* have expanded the parameters of the right of privacy, further limiting governmental interference in the realm of "personal liberties." <sup>64</sup> It is further submitted that *Roe* and *Quinlan* highlight the constitutional infirmities that plague the right of privacy, particularly as the right was enunciated in *Griswold*. <sup>65</sup> Adhering to the rationale developed in *Griswold*, the *Roe* Court discovered a constitutional right of privacy in the fourteenth amendment's concepts of personal liberty and restrictions upon state action. <sup>66</sup> The "personal liberty" recognized in *Roe* and *Quinlan* is, however, very different from any personal liberty previously found to exist within the scope of any constitutional provision. <sup>67</sup> Earlier decisions interpreting the fourteenth amendment concept of liberty in the privacy context granted constitutional protection only to those interests that are rooted most deeply in our society. <sup>68</sup> These decisions reflect such interests as society's deep concern for the sanctity

---

<sup>63</sup> 381 U.S. at 509 (Black, J., dissenting).

<sup>64</sup> For a discussion of *Roe* and *Quinlan* and their expansion of the right of privacy, see notes 39-49 and accompanying text *supra*.

<sup>65</sup> It is interesting to note that some contend that *Roe* did not even involve the right of privacy. See, e.g., *Roe v. Wade*, 410 U.S. 113, 172 (Rehnquist, J., dissenting); Ely, *supra* note 50, at 927-33. In his dissenting opinion in *Roe*, Justice Rehnquist stated:

I have difficulty in concluding, as the Court does, that the right of "privacy" is involved in this case. . . . A transaction resulting in an operation such as this is not "private" in the ordinary usage of that word. Nor is the "privacy" that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy.

410 U.S. at 172 (Rehnquist, J., dissenting) (citation omitted). Professor Ely has noted that while *Roe*, unlike *Griswold*, is not a case about government snooping, the *Roe* Court nonetheless relied on the right of privacy. Ely, *supra* note 50, at 931-32. He concluded that although the Court was legitimately concerned with the ill effects that enforcement of the Texas abortion statute might have on the mother's health, the decision has "nothing to do with privacy in the Bill of Rights sense or any other the Constitution suggests." *Id.* at 932. For a discussion of some of the difficulties raised by *Quinlan*, see Hyland & Baime, *supra* note 50, at 37.

<sup>66</sup> 410 U.S. at 153.

<sup>67</sup> See notes 1-6 and accompanying text *supra*. See also Ely, *supra* note 50, at 929 (*Griswold*, unlike *Roe*, perceivably connected to right of privacy as theretofore construed); Comment, *Roe and Paris: Does Privacy Have a Principle?*, 26 STAN. L. REV. 1161, 1177 (1964) (nothing in *Griswold* suggested extension beyond the marriage relationship).

<sup>68</sup> See *Poe v. Ullman*, 367 U.S. 497, 551-52 (Harlan, J., dissenting); *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). See also *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (marriage is a basic civil right); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (procreation is a basic civil right); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (person's right to teach and parents' right to engage him to instruct their children constitutionally protected).

of human life<sup>69</sup> and the role of the family in American culture.<sup>70</sup> It is submitted that, rather than fostering these deep-seated values, *Roe* and *Quinlan* have undermined them, placing American society in an awkward and often contradictory position.<sup>71</sup>

This trend is exemplified in the case of *Danforth v. Missouri*,<sup>72</sup> wherein the Supreme Court overturned a statute requiring parental consent for the performance of an abortion on a minor.<sup>73</sup> Since the *Danforth* Court did not assail the parental consent requirements in other areas, its decision has created an anomalous situation, dramatically reducing the importance of parental guidance and control over children.<sup>74</sup>

Professor Cox argues that decisions such as *Roe* and *Quinlan* have "[swept] away established law supported by the moral themes dominant in American life for more than a century in favor of what the Court takes to be the wiser view of a question under active public debate."<sup>75</sup> With these decisions the Court has abandoned its deference to the legislature and, as

---

<sup>69</sup> See Cox, note 58 *supra*; note 68 *supra*. See also Hassett, *Freedom and Order Before God: A Catholic View*, 31 N.Y.U.L. REV. 1170, 1186 (1956). Hassett notes that the tradition of our common law developed in the Judeo-Christian civilization from the Old and New Testaments and from theologians and philosophers. *Id.* "In this tradition the most radical and sacred right a person possesses is his right to life. And no human being or human institution has the right directly and deliberately to take the life of an innocent person." *Id.*

<sup>70</sup> See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>71</sup> See Noonan, *Abortion in the American Context*, HUMAN LIFE REV. 29, 33-34 (Winter 1977). Professor Noonan described one paradox resulting from the *Roe* ruling as follows:

Under our system, a minor child, boy or girl, cannot go to adult movies without parental permission. He or she cannot leave home against their parents' will; cannot do work they disapprove of; is legally incapable of making a contract, and cannot marry without their permission. At common law a surgeon may not remove tonsils or a mole on the skin or perform a skin graft on the body of an infant: that is, on any immature child—without parental consent. But abortion is treated differently. A girl of tender years, without parental permission, without even telling her father or mother, has an unqualified right to an abortion.

*Id.* It is submitted that *Roe* and *Quinlan* display a similar lack of respect for our society's fundamental belief in the sanctity of life. See generally *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, cert. denied, 429 U.S. 922 (1976); Cox, *The Supreme Court and Abortion*, HUMAN LIFE REV. 15, 16 (Fall 1976).

As Cox notes:

The opinion fails even to consider . . . the most compelling interest of the State in prohibiting abortion; the interest in maintaining that respect for the paramount sanctity of human life which has always been at the center of western civilization, not merely by guarding "life" itself, however defined, but by safeguarding the penumbra, whether at the beginning . . . or at death.

*Id.* at 15.

<sup>72</sup> 428 U.S. 52 (1976).

<sup>73</sup> *Id.* at 75; see note 46 *supra*.

<sup>74</sup> See Noonan, *supra* note 71, at 33-34. But cf. *Planned Parenthood v. Danforth*, 428 U.S. 52, 75 (1976) (granting parent absolute power to overrule decision of minor patient and her physician to terminate pregnancy does not strengthen family unit).

<sup>75</sup> Cox, *supra* note 71, at 17.

many believe, resurrected the once discredited era of substantive due process.<sup>76</sup> At least in the area of personal liberties, therefore, the Supreme Court is examining legislation closely to determine not only whether it achieves its objectives, but whether particular objectives are legitimate or illegitimate.<sup>77</sup> Today, this latter determination often "depends not on the Constitution, but on social conventions or 'conventional morality,' as perceived or reflected by the Justices of the Supreme Court or their counterparts in lower courts."<sup>78</sup> It is thus suggested that during the last two decades the courts have not only assumed a more active role,<sup>79</sup> but have adopted a new theory of constitutional adjudication frequently based on "contemporary morality" rather than on the Constitution and natural law.<sup>80</sup>

---

<sup>76</sup> See *Roe v. Wade*, 410 U.S. 113, 174-77 (Rehnquist, J., dissenting). *Griswold v. Connecticut*, 381 U.S. 479, 511 (Black, J., dissenting). See also Cox, *supra* note 55, at 791; Perry, *Substantive Due Process Revisited: Reflections on (And Beyond) Recent Cases*, 71 Nw. L. Rev. 417 (1977). Professor Perry describes substantive due process as "the judicial practice of constitutionalizing values that cannot fairly be inferred from the constitutional text, the structure of government ordained by the Constitution, or historical materials clarifying otherwise vague constitutional provisions." *Id.* at 419 (footnote omitted). Professor Perry further remarks that the *Roe* opinion is the "paradigmatic example of a court constitutionalizing nonconstitutional values." *Id.* at 420 (footnote omitted). For a further discussion of substantive due process, see note 54 *supra*.

<sup>77</sup> See Perry, *supra* note 76, at 419-20. Professor Perry apparently feels that the Court in *Roe* held the Texas abortion statutes unconstitutional because the objective of the laws was illegitimate; that is, they impermissibly infringed on a woman's right of privacy. *Id.* at 420-21.

<sup>78</sup> *Id.* at 420 (footnotes omitted). See also A. Cox, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 113-14 (1976); Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975). Professor Grey notes that, in invalidating the abortion statutes, the Court was not relying on the text of the Constitution. *Id.* at 708-09. "Rather, the broad textual provisions are seen as sources of legitimacy for judicial development and explication of basic shared national values." *Id.* at 709. Concerning these values, Professor Grey stated: "These values may be seen as permanent and universal features of human social arrangements—natural law principles—as they typically were in the 18th and 19th centuries. Or they may be seen as relative to our particular civilization, and subject to growth and change, as they typically are today." *Id.* Grey contends, however, that these "shared national values" are nothing more than the modern day analogues of our natural-rights. *Id.* at 717. Professor Tribe would allow the Court to go further. See Tribe, *supra* note 10, at 30-32. According to Tribe, there are some types of choices, such as the choice to abort, that should be left to private decision-makers, unchecked by substantive government control. *Id.* at 45. Accordingly, he views *Roe* as presenting the issue of whether the woman and her doctor, rather than the government, should have the authority to make the abortion decision. *Id.* at 39. See also Williams, *supra* note 10, at 179 (there is a sphere of conduct in which men ought to be free to act according to their consciences).

<sup>79</sup> See generally Cox, *supra* note 78, at 113-18.

<sup>80</sup> See *id.* at 114 (*Roe* not based on the Constitution or natural law—it is a pragmatic political judgment of a particular time and place); Ely, *supra* note 50, at 948-49 (Court in *Roe* based its conclusion on the practicalities of the situation, making little, if any attempt to trace its premises to the Constitution, from which it derived its authority); Grey, *supra* note 78, at 707-08 (in major cases, reference to and analysis of the Constitution plays a minor role—dominant norms of decision are broader concepts of governmental structure and indi-

## QUALITY OF LIFE AFTER ROE AND QUINLAN

*Roe* and *Quinlan* have been heralded as enlightened decisions, products of courts sensitive to the needs of modern society.<sup>81</sup> It is submitted that while these decisions arguably display judicial compassion for the plights of pregnant women and terminally-ill persons, in time they may prove dangerous to the judiciary itself. One commentator has noted that "we may pay too high a price for some short range results that are good in terms of immediate substantive public policy if the cost is the destruction, or even the impairment of the long run usefulness of the Court as an instrument for achieving other important objectives."<sup>82</sup> Although the Supreme Court can help mold our national policies, it will command respect and compliance only if its decisions are rooted in basic national values.<sup>83</sup> It is suggested that the decisions in both *Roe* and *Quinlan* lack this necessary foundation.<sup>84</sup> Rather than providing shining reflections of our long-standing principles, *Roe* and *Quinlan* stand as signs of the times, monuments to contemporary morality and pragmatism.<sup>85</sup>

As a result of *Roe* and *Quinlan*, the constitutional right of privacy has become more than a right of individual autonomy.<sup>86</sup> Moreover, an analysis

---

vidual rights are, at best, merely referred to and whose content is barely specified in the Constitution).

<sup>81</sup> See note 50 *supra*.

<sup>82</sup> See Cox, *supra* note 55, at 821-22. While Professor Cox views all law as a "human instrument designed to meet human needs," he expresses concern over how these needs can be met best, not only for ourselves, but for our children and our children's children. *Id.* at 821. Continuing in this vein, he notes that "[t]he Judicial branch is uniquely dependent upon the power of legitimacy when engaged in constitutional adjudication; and belief in the legitimacy of its constitutional decisions is therefore a matter of prime importance." Cox, *supra* note 78, at 103. Accordingly, compliance with judicial decrees, and the concomitant respect for the integrity of the institution itself, results from the belief that the courts are legitimately performing their proper function. *Id.* at 103-04. Cox concludes that without this sense of legitimacy, the courts would be vulnerable to assaults and reprisals from the other branches of government as well. *Id.* at 104.

<sup>83</sup> See Cox, *supra* note 78, at 117. Cox views the Court's constant utilization of substantive due process as proof of the strength, rather than the abandonment, of our natural law inheritance in constitutional adjudication. *Id.* at 113. He also states:

Constitutional rights ought not to be created under the Due Process Clause unless they can be stated in principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place.

*Id.* at 114.

<sup>84</sup> See *id.* at 113-18.

<sup>85</sup> See *id.* Professor Cox comments:

My criticism of *Roe v. Wade* is that the Court failed to establish the legitimacy of the decision by not articulating a precept of sufficient abstractness to lift the ruling above the level of a political judgment based upon the evidence currently available from the medical, physical, and social sciences.

*Id.* at 113.

<sup>86</sup> See, e.g., *Roe v. Wade*, 410 U.S. at 152-54; *In re Quinlan*, 70 N.J. at 40, 355 A.2d at 663; Comment, *In re Quinlan: Defining the Basis for Terminating Life Support Under the Right*

of the relevant case law and commentary suggests that American society is now faced with questions of even greater moment than whether a fetus or comatose patient will live or die.<sup>87</sup> In essence, it appears that these decisions have broadened the scope of the right of privacy to guarantee a minimum quality of life for at least certain select groups.<sup>88</sup>

It has been asserted that by analogizing the terminally ill person to the mother, rather than the fetus, *Roe* provided a constitutional basis for *Quinlan*.<sup>89</sup> This analogy aptly illustrates the Court's concern for the quality of life for at least certain select groups. In acknowledging the existence of a woman's right to choose to abort a non-viable fetus, the majority opinion in *Roe* seemed to focus primarily on the plight of the pregnant woman, with comparatively little discussion given the text of the fourteenth amendment.<sup>90</sup> In Justice Blackmun's words, the woman could be the victim of

[s]pecific and direct harm. . . . Maternity . . . may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise to care for it. In other cases, . . . the additional difficulties of unwed motherhood may be involved.<sup>91</sup>

While the *Roe* opinion described some very serious and pervasive social problems, it is submitted that such concerns for convenience and the quality of life of the mother and her existing family should not be enough to subordinate, once and for all, the life of the "non-viable" fetus.<sup>92</sup>

---

of *Privacy*, 12 *TULSA L. REV.* 150 (1976).

<sup>87</sup> See notes 92 & 97 *infra*.

<sup>88</sup> See generally Note, *The Tragic Choice: Termination of Care for Patients in a Permanent Vegetative State*, 51 *N.Y.U.L. REV.* 285, 296 (1976) [hereinafter cited as *N.Y.U. Note*] (though the value of continued existence cannot be calculated, a person might have an even greater interest in choosing a minimum quality of life); Comment, *supra* note 86, at 166. In analyzing *Quinlan*, one author has suggested:

[*Quinlan*] . . . is ostensibly a recognition that the right of privacy protects a patient's decision to have a life-support system discontinued in order that the natural process of death may accomplish its mission. By accepting that the state's interest weakens when the life it seeks to protect has been permanently reduced to a vegetative level, *Quinlan* is, more significantly, a legal realization that not only the fact of life but the quality of life is a very important aspect of human existence.

*Id.* (emphasis added).

<sup>89</sup> See *N.Y.U. Note*, *supra* note 88, at 292.

<sup>90</sup> See *Roe v. Wade*, 410 U.S. at 153. See also Ely, *supra* note 50, at 932-33.

<sup>91</sup> 410 U.S. at 153.

<sup>92</sup> See Williams, *supra* note 10, at 187-91. Mr. Williams focuses on the hardship that pregnancy could impose not only to the woman and her family, but to society as a whole. *Id.* at 190. He depicts an "unsuitable" family where

[t]he mother is in good health, but . . . is failing to cope with her existing three or four children, who are undernourished and out of control; the husband is on probation and in debt, and now further criminal charges are pending against him. The mother is pregnant. Abortion cannot be justified on health grounds, but new arrivals in the



In recognizing a similar privacy right, the *Quinlan* court concentrated on the quality of life of the comatose victim, vividly depicting her pitiful condition and labelling her a "biologically vegetative remnant of life."<sup>93</sup> Following further examination of Karen's acute condition,<sup>94</sup> the *Quinlan* court applied a *Roe*-type analysis and determined that Karen should have the right to choose death.<sup>95</sup> It is submitted that no matter how appealing the result reached in *Quinlan* may seem, the case establishes a dangerous precedent, especially when read in light of the *Roe* case. Future courts, relying on the indefinite language of the New Jersey Supreme Court,<sup>96</sup> might permit persons to terminate their lives in situations where there are greater chances of recovery than were Karen Quinlan's.<sup>97</sup> While proponents

---

family will increase the probability that all the children will be neglected and later become delinquent.

*Id.* In the above situation, abortion is viewed as the only way "to halt the worsening position of the family." *Id.*

<sup>93</sup> See 70 N.J. at 38, 355 A.2d at 662.

<sup>94</sup> *Id.* at 25-26, 355 A.2d at 655-56. The *Quinlan* court noted that "Karen is described as emaciated, having suffered a weight loss of at least 40 pounds, and undergoing a continuing deteriorative process. Her posture is . . . fetal-like and grotesque; there is extreme flexion—rigidity of the arms, legs and related muscles and her joints are severely rigid and deformed." *Id.* at 26, 355 A.2d at 655. The court also indicated that the comatose patient has no awareness of persons or things around her and the quality of her feeling impulses is unknown. *Id.* at 25-26, 355 A.2d at 655.

<sup>95</sup> *Id.* at 40, 355 A.2d at 663. In discussing a patient's right of choice, the court stated:

We think that the State's interest *contra* weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims. Ultimately there comes a point at which the individual's rights overcome the State interest. It is for that reason that we believe Karen's choice, if she were competent to make it, would be vindicated by the law.

*Id.* at 41, 355 A.2d at 664.

<sup>96</sup> See *id.* at 40, 355 A.2d at 663 (constitutional right of privacy broad enough to encompass a patient's decision to decline medical treatment under certain circumstances).

<sup>97</sup> See generally Delgado, *Euthanasia Reconsidered—The Choice of Death as an Aspect of The Right of Privacy*, 17 ARIZ. L. REV. 474, 491-93 (1975). Prior to *Quinlan*, in speculating as to possible extensions of *Roe*, Professor Delgado posited the situation of a wage earner and father of several children, suffering from cancer. *Id.* at 491. The disease, though at present incurable, could be controlled by radiation and chemotherapy to extend the patient's life expectancy from 6 months to 2 years. *Id.* at 491-92. These treatments are expensive, however, and have harmful side effects. *Id.* at 492. Concluding that he would prefer to die than buy time, the patient asks his doctor to administer a lethal dose of a pain-killing drug, which request the doctor refuses. *Id.* Professor Delgado similarly would refuse the patient's request:

In these circumstances, it seems plausible that the state's interests in forbidding the father to choose death outweigh his interest in seeking an early and painless end. The father has not passed the point of productivity and should not be permitted to avoid his obligation to support his dependents. On the other hand, once the father's disease has run its course and left him bedridden and unable to engage in work or family activities, the state's interests diminish, and his request to die should be honored.

*Id.* (footnotes omitted). It is submitted that reasoning such as Delgado's degrades the innate value of human life and places a price thereon, a price determined solely by a person's productive value in the societal labor and support markets. It is submitted further that

of the concept of death with dignity may advocate a liberal application of *Quinlan*,<sup>98</sup> it is submitted that granting a person the right to voice his preference for a "quick" and "dignified" exit<sup>99</sup> would undermine our traditional belief in the sanctity of human life<sup>100</sup> and encourage viewing life in terms of subjective value to society.<sup>101</sup>

Another danger inherent in the *Quinlan* court's reliance on *Roe* relates to the notion of viability adopted by the *Roe* Court.<sup>102</sup> While the right to terminate the life of a fetus or a "dying" patient is not absolute,<sup>103</sup> both *Roe* and *Quinlan* may be read to require a certain degree of physiological autonomy and potential for consciousness to exist before a compelling state interest arises<sup>104</sup>—an interest that is strong enough to justify governmental protection of the life of the fetus or "dying" patient. For the fetus, the Supreme Court has set this point at viability—the point at which the fetus attains personhood for fourteenth amendment purposes.<sup>105</sup> For the seriously-ill, in contrast, some argue that autonomy and consciousness are lost when an individual enters into a "life-prolonging womb of plastic and metal"—when extraordinary means must be employed to keep him alive.<sup>106</sup> According to this interpretation, the dying patient, while formerly a

---

human life has a deeper value that precludes quantification in terms of mere ability to function as a "productive" member of society. See generally Hassett, *supra* note 69, at 1170-88. Professor Hassett finds it inexcusable for a person deliberately to take his life, even if he suffers from an incurable disease: "The right to life and the obligation to sustain human life prevails because it is a serious moral evil directly and deliberately to take the life of an innocent person." *Id.* at 1186. But see Delgado, *supra*, at 474-81, 488-89 (protracted death is often accompanied by fear, indignity, loss of control of bodily functions and incessant pain; medical facilities in short supply should not be tied up by patients who would rather die); Weigal, *The Dying Patient's Rights—Do They Exist?*, 16 S. TEX. L.J. 153, 163 (1975) ("[t]he anguish of families who must watch the agonizing depersonalization during the morbid and protracted living wake of someone they cherish is rivaled, in a more tangible sense, by the impoverishment often suffered due to the crushing expense that can be involved in the care of such an individual" (footnote omitted)).

<sup>98</sup> See, e.g., Note, *Informed Consent and the Dying Patient*, 83 YALE L.J. 1632, 1650 (1974) (life and death are not alternatives in terminal situations; alternatives are either a prolonged death or a quicker one maintaining what the patient considers as his dignity). See also Williams, *supra* note 10, at 178-87. The New Jersey Supreme Court apparently agreed with the sentiments expressed in the Yale Note, at least in the *Quinlan* situation, because after a thorough explanation of Karen Quinlan's condition, it stated: "We have no doubt, in these unhappy circumstances, that if Karen were herself miraculously lucid for an interval . . . and perceptive of her irreversible condition, she could effectively decide upon discontinuance of the life-support apparatus, even if it meant the prospect of natural death." 70 N.J. at 39, 355 A.2d at 663.

<sup>99</sup> See note 97 and accompanying text *supra*.

<sup>100</sup> See Hyland & Baime, *supra* note 50, at 60; notes 69 & 71 and accompanying text *supra*.

<sup>101</sup> See Hassett, *supra* note 69, at 1184-88; Hyland & Baime, *supra* note 50, at 58-60.

<sup>102</sup> *Roe v. Wade*, 410 U.S. at 156-64.

<sup>103</sup> See generally notes 46-49 and accompanying text *supra*.

<sup>104</sup> See N.Y.U. Note, *supra* note 88, at 291.

<sup>105</sup> See *Roe v. Wade*, 410 U.S. at 156-61.

<sup>106</sup> See N.Y.U. Note, *supra* note 88, at 291-92.

"person" within the meaning of the fourteenth amendment, ceases being viable when he is no longer able to live without extraordinary means and therefore may have his life terminated.<sup>107</sup> It is submitted that there are several problems with this argument. First, viability of both fetuses and dying patients seems to be subject to the ever-changing state of medical technology.<sup>108</sup> Accordingly, the fundamental constitutional right to choose in both instances may be placed at the mercy of scientific development.<sup>109</sup> To so tie a constitutional right to technological developments would jeopardize not only the stability of the particular right, but also the integrity of our constitutional system.<sup>110</sup> Secondly, the concept of viability is susceptible to subjective value determinations of social worth, particularly in the context of euthanasia.<sup>111</sup> For example, the state might permit people to choose death for themselves or for seriously-ill members of their families if chances of recovery and reentry into the work force are slim.<sup>112</sup> Alterna-

<sup>107</sup> See *id.*, *In re Quinlan*, 70 N.J. at 40, 355 A.2d at 663-64. One commentator has stated that "[o]nce a patient becomes permanently dependent on life prolonging treatment . . . the patient should no longer be considered a legal person, nor should the state's interest in preserving life in a permanent vegetative state be deemed compelling once the point of *Roe*-defined viability has passed." N.Y.U. Note, *supra* note 88, at 292. It is submitted that this commentator, much as Mr. Williams did with abortion, see Williams, *supra* note 10, at 201, takes the easiest and most convenient way out of a most difficult constitutional dilemma. Mr. Williams states that since "[w]e have been given no revelation as to the beginning of human personality . . . we are entitled to fix it at the point of time demanded by human needs." *Id.*

<sup>108</sup> See, e.g., *Roe v. Wade*, 410 U.S. 113, 162-64 (1972) (health of the mother the compelling point); Cox, *supra* note 78, at 113. It would appear that, whatever problems are caused by the changing state of medical technology, they are particularly extreme in the euthanasia context since there exists no consensus on the definition of death. See Hyland & Baime, *supra* note 50, at 40-49. It does seem, however, that the concept of "brain death" is gaining widespread acceptance as the actual time of death. *Id.* at 41-42, 49-50; see N.Y.U. Note, *supra* note 88, at 286-89.

<sup>109</sup> See *Roe v. Wade*, 410 U.S. 113, 160-64 (1972). Employing the *Roe* Court's definition of viability as the point at which the fetus presumably has the capability of meaningful life outside the mother's womb, it can be argued that as scientific advances are made and a fetus acquires the capability of meaningful life at stages even earlier than the sixth month, the woman's right to abort will be restricted accordingly. See generally *id.* Similarly, since medical discoveries are constantly extending the length of human life, and new cures are continually being found for diseases, it is becoming increasingly difficult to determine which situations are truly hopeless. See generally Hyland & Baime, *supra* note 50, at 40-42.

<sup>110</sup> See notes 50-58 and accompanying text *supra*.

<sup>111</sup> See, e.g., Delgado, *supra* note 97, at 493 (an individual in his final years should have unlimited access to medical aid in bringing about his death and the state should interfere only when such intervention is necessary to secure continued productivity of a person who owes a duty to the state, such as testifying at trial or supporting dependents); Note, *The "Living Will"—An Individual's Exercise of His Rights of Privacy and Self-Determination*, 7 *LOV. U. CHI. L. REV.* 714, 719 (1976) (state has no overriding interest in preserving life of a non-cognitive person who has no recognizable impact on society).

<sup>112</sup> See note 97 *supra*. For a brief discussion of the difficulties involved when the decision to terminate a life is made by a third person, as in *Quinlan*, see *In re Quinlan*, 70 N.J. at 41-42, 355 A.2d at 665; Hyland & Baime, *supra* note 50, at 59.

tively, the right to die might be granted because the costs of life-sustaining machinery greatly outweigh the potential benefit to the patient. However, the most serious problem with the precedent set by the *Quinlan* decision is that, in the end, it allows judges to make the ultimate determinations of life and death. This, it is respectfully submitted, they are not equipped to do alone.<sup>113</sup>

#### CONCLUSION

It is submitted that the *Griswold*, *Roe* and *Quinlan* decisions are, in effect, examples of judicial legislation<sup>114</sup> that establish dangerous precedents. Their bold expansion of the right of privacy could pave the way for future courts to extend old or develop new privacy rights.<sup>115</sup> It is not inconceivable, for example, that a court employing a *Roe*-type analysis could give the parents of a child *born* with genetic defects the option of putting the infant to rest.<sup>116</sup> At the opposite end of the spectrum, a person less than terminally-ill might be permitted to choose death even before hope of recovery had run out.<sup>117</sup> It is submitted that, in the end, the right of privacy may come to protect only the lives of the mentally, emotionally and physically healthy. If this should occur, maybe then we will become a truly strong nation; maybe then all men will be truly equal; indeed, maybe then it will be 1984.

---

<sup>113</sup> See Hyland & Baime, *supra* note 50, at 60.

<sup>114</sup> See notes 50-58 and accompanying text *supra*.

<sup>115</sup> See Clark, *supra* note 61, at 833-34, 881-84.

<sup>116</sup> See generally Louisell, *Abortion, The Practice of Medicine and the Due Process of Law*, 16 U.C.L.A. L. REV. 233, 249, 253 n.90 (1969).

<sup>117</sup> See generally Delgado, *supra* note 97, at 493-94; notes 96-112 and accompanying text *supra*.